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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

THRIVE HOOD RIVER, OREGON WILD,  
SIERRA CLUB, OREGON NORDIC CLUB,  
FRIENDS OF MOUNT HOOD, OREGON  
KAYAK AND CANOE CLUB, and MIKE  
McCARTHY,

Plaintiffs,

v.

META LOFTSGAARDEN, Forest  
Supervisor for the Mt. Hood National Forest,  
and the UNITED STATES FOREST  
SERVICE,

Defendants,

and

MT. HOOD MEADOWS OREG., LLC,

Defendant-Intervenor.

Case No. 3:22-cv-01981-AR

**PLAINTIFFS' MOTION TO COMPEL  
COMPLETION OF THE  
ADMINISTRATIVE RECORD WITH 13  
NEWLY-DISCLOSED DOCUMENTS  
AND PRIVILEGE LOG**

**MOTION**

Plaintiffs Thrive Hood River, Oregon Wild, Sierra Club, Oregon Nordic Club, Friends of Mount Hood, Oregon Kayak and Canoe Club, and Mike McCarthy (collectively “Conservation Plaintiffs”) respectfully move for an Order requiring Defendants U.S. Forest Service and Meta Loftsgaarden (collectively the “Forest Service”): (1) to complete the Administrative Record (“AR”) by adding to it 13 documents recently disclosed by the Forest Service on a privilege log (*see* Buss Decl., Ex 1); and (2) to prepare and file a full privilege log identifying with specificity the documents withheld from the AR because Forest Service staff determined they were “deliberative” or withheld on the basis of any privilege.

In compliance with LR 7-1(a), the parties made a good faith effort to resolve the dispute through multiple communications on multiple days, including email and telephone communications, and have been unable to do so.

**MEMORANDUM**

**A. Introduction**

This is not the first record-related motion in this case. Conservation Plaintiffs previously filed a Motion to Compel Completion of the Administrative Record and Production of Privilege Log (ECF 23), which this Court granted in part and denied in part. ECF 36 (Judge Armistead’s Opinion & Order); ECF 45 (Judge Simon’s Order).<sup>1</sup> In response to the Court’s direction, the Forest Service recently provided Conservation Plaintiffs with a short privilege log identifying 13 documents. Buss Decl., Ex. 1 (privilege log). Those documents—with sensitive tribal-related

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<sup>1</sup> Because the present Motion is essentially an extension and continuation of the previous dispute about the AR and privilege log, Conservation Plaintiffs hereby incorporate their relevant prior briefing. ECF 23 (Motion to Compel); ECF 31 (Reply in Support of Motion).

1 information redacted, at least for now—should all be included in the AR because the Forest  
 2 Service considered them before making the decision challenged in this case. And because it is  
 3 now clear—for the first time—that the Forest Service’s certifications of record to this Court were  
 4 erroneous, there is now adequate justification for this Court to require the preparation of a *full*  
 5 privilege log detailing the alleged “deliberative” and other documents withheld by the Forest  
 6 Service.

## 7 **B. Legal Standards**

8 Judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*,  
 9 must be based upon the review of the “whole record” developed during the agency’s decision-  
 10 making process. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–420 (1971),  
 11 *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). If the administrative  
 12 record is incomplete, the Court will be unable to determine “whether the decision was based on a  
 13 consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* A  
 14 complete administrative record is thus essential for effective review.

15 The proper scope of an administrative record is broad and includes “everything that was  
 16 before the agency pertaining to the merits of its decision.” *Portland Audubon Soc’y v.*  
 17 *Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). The administrative record is  
 18 “not necessarily those documents that the *agency* has compiled and submitted as ‘the’  
 19 administrative record.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)  
 20 (emphasis in original). Rather, “[t]he ‘whole’ administrative record . . . consists of all the  
 21 documents and materials directly or *indirectly* considered by agency decision-makers and  
 22 includes evidence contrary to the agency’s position.” *Id.* (internal quotation marks omitted).  
 23

1 Because the administrative record must include materials both directly *and* indirectly considered  
2 by agency decisionmakers, it “naturally encompasses the underlying work and recommendations  
3 of agency subordinates.” *Nat. Res. Def. Council v. Gutierrez*, No. C 01-0421 JL, 2008 WL  
4 11358008, at \*6 (N.D. Cal. Jan. 14, 2008) (internal citations omitted); *see also Regents of the*  
5 *Univ. of California v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324,  
6 at \*2 (N.D. Cal. Oct. 17, 2017) (the “whole record” includes “documents that literally passed  
7 before the eyes of the final agency decision maker but also documents that were considered and  
8 relied upon by subordinates who provided recommendations.” (internal quotation marks  
9 omitted)). While “an agency’s statement of what is in the record is subject to a presumption of  
10 regularity[,]” that presumption may be rebutted by “clear evidence to the contrary.” *Goffney v.*  
11 *Becerra*, 995 F.3d 737, 748 (9th Cir. 2021).

12 Once the movant has shown that the record is incomplete, the Court may order the  
13 agency to complete the administrative record. *See, e.g., Doe v. Trump*, No. 3:19-CV-1743-SE,  
14 2020 WL 1853657, \*5 and n.1 (D. Or. April 13, 2020); *Ctr. for Biological Diversity v. U.S.*  
15 *Bureau of Land Mgmt.*, No. C-06-4884-SI, 2007 WL 3049869, at \*4 (N.D. Cal. Oct. 18, 2007).

16 Deliberative documents “are ordinarily not relevant” in APA cases. *Blue Mountains*  
17 *Biodiversity Project v. Jeffries*, 99 F.4<sup>th</sup> 438, 445 (9th Cir. 2024), *cert. denied*, \_\_\_\_ S. Ct. \_\_\_\_,  
18 2025 WL 76440 (January 13, 2025) (quoting *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir.  
19 2019). “Because deliberative materials are ‘not part of the administrative record to begin with,’  
20 they are ‘not required to be placed on a privilege log.’” *Jeffries*, 99 F.4th at 445 (quoting  
21 *Oceana*, 920 F.3d at 865 (simplified)).

22 However, importantly, an agency’s determination that documents are, in fact, deliberative  
23 is subject to judicial review, **and** the court may require production of a privilege log to aid that

1 analysis. *Id.* The *Jeffries* court also observed that “‘a showing of bad faith *or improper behavior*’  
 2 might justify production of a privilege log to allow the district to determine whether excluded  
 3 documents are actually deliberative.” *Id.* (emphasis added) (quoting *Oceana*, 920 F.3d at 865).

#### 4 **C. Argument**

##### 5 **1. The Forest Service’s failure to include in the AR the 13 documents described** 6 **in the privilege log rebuts the agency’s presumption of completeness.**

7 While “an agency’s statement of what is in the record is subject to a presumption of  
 8 regularity[.]” that presumption may be rebutted by “clear evidence to the contrary.” *Goffney v.*  
 9 *Becerra*, 995 F.3d 737, 748 (9th Cir. 2021). To overcome the presumption, a plaintiff must  
 10 identify the alleged omitted documents with “sufficient specificity” and “identify reasonable,  
 11 non-speculative grounds for the belief that the documents were considered by the agency and not  
 12 included in the record.” *Oceana, Inc. v. Pritzker*, No. 16-CV-06784-LHK (SVK), 2017 WL  
 13 2670733, at \*2 (N.D. Cal. June 21, 2017) (quoting *Gill v. Dep’t of Justice*, No. 14-CV-03120-RS  
 14 (KAW), 2015 WL 9258075, at \*5 (N.D. Cal. Dec. 18, 2015)). Conservation Plaintiffs have met  
 15 this standard.

16 Here the Court now knows that the AR is incomplete. That is clear, because the Forest  
 17 Service now admits that it completely omitted from the AR 13 documents, which the agency also  
 18 admits *were considered* by the agency before the challenged decision was issued. Those 13  
 19 documents are all described in—and constitute the whole of—the recent privilege log provided  
 20 by the Forest Service in compliance with Judge Simon’s Order. Buss Decl., Ex. 1. And, notably,  
 21 the Forest Service does not claim that any of those documents are “deliberative.”

22 Conservation Plaintiffs requested in their previous record-related motion that additional  
 23 tribal communication documents be included in the AR. ECF 23 at 10-12. This Court denied that

1 part of the motion because Conservation Plaintiffs had not identified the tribal documents with  
2 specificity and had not shown that the Forest Service had considered those documents. *See* ECF  
3 36 at 6-8. This Court said:

4 “As plaintiffs argue, there is a distinction between relevance and completion of the  
5 record. The “whole record” includes all the documents directly and indirectly  
6 considered – not just those documents that are related to the merits of plaintiffs’  
7 claims. *See Oceana v. Pritzker*, 2017 WL 2670733, at \*5 (distinguishing between  
8 relevance and completion of administrative record). Even so, plaintiffs have not  
9 identified with sufficient specificity that additional tribal consultation and  
10 communication documents exist. They also have not provided reasonable,  
11 nonspeculative grounds to believe such documents were considered by the Forest  
Service when deciding the ROD, EIS, or appraisals, and were omitted from the  
administrative record. Plaintiffs’ belief that additional materials exist is grounded  
solely on the conferral correspondence quoted above. They have not identified any  
specific documents or provided details about which tribes were consulted, or when  
such consultations and communications occurred. Thus, plaintiffs have not  
overcome the presumption of regularity and completeness with clear evidence with  
respect to this category of documents, and their motion on this basis is denied.”

12 *Id.* at 7-8.

13 But circumstances have changed. Based on the privilege log recently provided by the  
14 Forest Service in response to this Court’s direction, Plaintiffs can now identify these documents  
15 with specificity: the documents sought to be included in the AR are the 13 documents described  
16 in the privilege log. Buss Decl., Ex. 1. And the Forest Service admits that those 13 documents  
17 are “properly part of the administrative record.” Buss Decl., Ex 2 (letter from Forest Service’s  
18 attorney submitted with privilege log).

19 Therefore, the reasons for this Court’s previous denial of Conservation Plaintiffs’ request  
20 no longer apply. Since the 13 specifically-identified documents were “directly or indirectly  
21 considered by agency decision-makers[,]” *Thompson*, 885 F.2d at 555, they should be added to  
22 the AR—either with sensitive tribal-related information redacted as appropriate, or under seal.  
23 But it is impossible to assess the Forest Service’s claims of privilege with regard to these

1 documents without seeing them, at least in redacted form. And it is hard to see how all 13  
2 documents—and every word they contain—are fully privileged as “Sensitive Tribal Sites  
3 Information,” which is the only privilege the Forest Service invokes. *See* Buss Decl., Ex. 1.

4  
5 **2. A full privilege log is now warranted.**

6 This Court has already acknowledged that an agency’s classification of documents as  
7 “deliberative” is subject to judicial review, and that the Court may require production of a  
8 privilege log to aid that review. ECF 36 at 10 (Opinion and Order). But, as noted, the Court  
9 previously ordered the Forest Service to produce only a limited privilege log which did not  
10 address documents withheld as “deliberative.”

11 In declining at that time to order a *full* privilege log, the Court said:

12 “With respect to this case, because thus far there is no showing of bad faith or  
13 impropriety, the Court follows *Jeffries* and declines to order Defendants to create a  
14 privilege log of deliberative process materials or other privileged materials that  
15 generally would not be part of the administrative record. Defendants must,  
16 however, produce a privilege log for materials that ordinarily would be part of the  
17 administrative record but are being withheld or redacted based on the grounds of  
18 privilege or the attorney work-product doctrine.”

19 ECF 45 at 5. Here again, things have changed since then. A full privilege log is now warranted  
20 under *Jeffries* because it is now clear that the Forest Service’s previously-filed certifications of  
21 record were erroneous. That is, they contained material misrepresentations. That constitutes  
22 “impropriety” under the new *Jeffries* standard and a full privilege log is, therefore, appropriate.

23 When the Forest Service filed the original AR and the amended AR in this case, it  
submitted certifications—in the form of declarations—from agency employee Stacey Grimes,  
which stated that the AR was prepared under her “direction and oversight.” ECF 19 at 2; ECF 27  
at 2. In those declarations Ms. Grimes certified under penalty of perjury that the AR she

1 compiled was complete. *See* ECF 27 at 3 (“To the best of my knowledge and belief, the revised  
2 administrative record documents provided on the thumb drive are the materials considered, either  
3 directly or indirectly, by the relevant Forest Service officials in connection with the challenged  
4 decision.”); ECF 19 at 2 (similar language).

5 But we now know definitively that the AR (both original and revised) that Ms. Grimes  
6 certified to the Court were *not in fact* the full record considered by the agency, and that the  
7 Forest Service was withholding (but not disclosing) at least 13 documents that it now admits are  
8 properly part of the AR. Those are the 13 documents described in the recently provided privilege  
9 log. Buss Decl., Ex. 1. Although probably not rising to the level of “bad faith” under *Jeffries*,  
10 Conservation Plaintiffs submit that the filing of two inaccurate AR certification documents at a  
11 minimum constitutes “impropriety” under *Jeffries* that justifies the Court requiring preparation of  
12 a full privilege log.

13 To be clear, Conservation Plaintiffs are not accusing Ms. Grimes of perjury. It is almost  
14 certainly true that she *believed* she was filing the full AR. Nonetheless, Ms. Grimes' declarations  
15 are demonstrably unreliable. The filing of two inaccurate AR certifications raises serious  
16 questions about how the agency went about preparing the AR here, and about how that apparent  
17 process undermines confidence that the agency properly classified documents as “deliberative”  
18 or otherwise privileged.

19 As illustrated by *Bartell Ranch LLC v. McCullough*, No. 321CV00080, 2022 WL  
20 2093053 (D. Nev. June 10, 2022), serious problems arise when documents are excluded as  
21 “deliberative” without proper and adequate review. In *Bartell Ranch* many thousands of  
22 documents were initially excluded by the agency as “deliberative” *without review by the agency*  
23 *or its counsel*. A similarly problematic situation may have occurred here.



1           Although it's not entirely clear, based on available information it appears that Ms.  
2           Grimes (who is apparently not a lawyer) was responsible—as she worked to assemble the AR in  
3           this case—for evaluating and classifying the agency's documents as either "deliberative" or not.  
4           But whether a document is “deliberative” (or not) is a *legal question* that requires review by—  
5           and the judgment of—a trained lawyer. The same is true of review of documents for possible  
6           privilege.

7           And yet the only information the Forest Service provided about the preparation and  
8           submission of the AR suggests that if those reviews occurred at all, they were performed by a  
9           non-lawyer. And that non-lawyer has now been shown to have certified and filed an incomplete  
10          AR without disclosing the withheld documents. That was done not just once, but twice. As a  
11          result, Conservation Plaintiffs (and likely this Court) justifiably do not have confidence that the  
12          “deliberative” and “privileged” determinations made by the agency were subject to adequate  
13          internal oversight.

14          To avoid a *Bartell Ranch* situation, this Court should require the Forest Service to  
15          prepare a full privilege log explaining the basis for withholding documents as “deliberative” or  
16          under any claim of privilege. Only that process will ensure proper legal review of the other  
17          withheld documents. And to the extent it is ultimately shown that the agency improperly  
18          classified documents as "deliberative," those documents should be included in the AR.

19          "[W]hether materials are in fact deliberative is subject to judicial review, and in  
20          appropriate circumstances district courts may order a privilege log to aid in that analysis. . . . [A]  
21          showing of bad faith *or improper behavior* might justify production of a privilege log to allow  
22          the district [court] to determine whether excluded documents are actually deliberative." *Jeffries*,

23

99 F.4th at 445 (emphasis added, internal quotation marks omitted). Conservation Plaintiffs respectfully suggest that these are “appropriate circumstances” to require a full privilege log.

### CONCLUSION

For the above reasons, the 13 documents listed in the Forest Service’s privilege log should be added to the AR. Further, the Forest Service should be instructed to file a full privilege log identifying each of the documents the agency withheld from the AR due to its unilateral determination that they were “deliberative.” The agency should also be required to identify in that log any documents withheld under any other claim of privilege.

Respectfully submitted this 21<sup>st</sup> day of March 2025.

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